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JEANNE HICKS, Clerk
BY Rita Storms
Deputy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

DIVISION PRO TEM B

HON. WARREN R. DARROW

By: Diane Troxell, Judicial Assistant

CASE NUMBER: V1300CR201080049

Date: April 19, 2011

TITLE:	COUNSEL:
STATE OF ARIZONA	Sheila Sullivan Polk Yavapai County Attorney Bill Hughes, Esq. Steven Sisneros, Esq. Deputy Yavapai County Attorneys
(Plaintiff)	(For Plaintiff)
vs.	
JAMES ARTHUR RAY	Thomas K. Kelly, Esq. 425 E. Gurley Prescott, AZ 86301 Luis Li, Esq. Brad Brian, Esq. Truc Do, Attorney at Law Miriam Seifter, Attorney at Law MUNGER TOLLES & OLSON LLP 355 S. Grand Avenue, 35th Fl. Los Angeles, CA 90071
(Defendant)	(For Defendant)

UNDER ADVISEMENT RULINGS ON STATE'S MOTIONS TO EXTEND TIME FOR DISCLOSURE FILED MARCH, 14, MARCH 24, AND MARCH 28, 2011

The Court has considered the State's motions, and the arguments of counsel.

(1) March 24 motion.

The parties agreed in open court on April 14, 2011, that the matter is moot as the evidence in question, specifically photographs or images of poison, has been admitted. However, the parties did not address other information pertaining to the composition of the logs. If this latter type of evidence is going to be offered, the Court must be notified such that the issue can be determined without delaying the trial.

(2) March 14 motion.

(a) Items 2 and 3 (Samurai Game).

The State argues that the defense opened the door to admissibility of items 2 and 3 listed in the motion through opening statement and cross-examination. Arizona Courts appear to follow the rule that even though an opening statement does not constitute evidence, "[a] party may open the door to a given subject during its opening statement." *State v. Atlas*, 224 Mont. 92, 99-101, 728 P.2d 421, 425-26 (1986); *see Elia v. Pifer*, 194 Ariz. 74, 79, 977 P.2d 796, 801 (App.1999). With regard to opening the door merely by asking a question on cross-examination, this situation seems distinguishable from the State's assertion regarding the language used in the opening statement. In any event, as the witness was without knowledge on the subject of the question, there was really no evidence or assertion to rebut.

As noted by the Defendant, the email and letter are hearsay and inadmissible. However, the State apparently intends to call newly listed or re-listed witnesses, Lance Giroux and Chris Majer, to cover the same information. This information has only marginal relevance based on the evidence presented to date. The State has introduced extensive evidence concerning its position on the manner in which the Samurai Game was conducted at the 2009 Spiritual Warrior Seminar. The jury may or may not find that this evidence supports a State theory relating to the charges. Adding evidence that the manner in which the game was conducted did not comport with required training techniques and evidence that use of the game may have violated licensing requirements would not affect the substance of the admitted testimony in any way. Furthermore, the significance of the Samurai Game to the State is not something first discovered during trial, and it is not appropriate to expand this already lengthy trial to include possible issues concerning appropriate training and licensing for use of the Samurai Game. Obviously, this trial is not the forum for litigating questions concerning intellectual property rights.

Evidence of the type proposed by the State would basically be propensity or character evidence, and the Defendant did not open the door to admission of this highly damaging form of evidence or to a "mini-trial" involving the possible importance of conducting the game the "correct" way. Technically, the Defendant may have opened the door to limited evidence that the Samurai Game as conducted at the 2009 Spiritual Warrior Seminar differs from the way it is actually conducted by the military and corporations. In this regard, the language used during the opening statement would be significant. If the Defendant stated that there would be evidence that the 2009 Spiritual Warrior version is the "same" or similar game used in the military and large corporations and there is evidence to the contrary, such evidence may be relevant to address a misstatement and possible inference drawn by the jury. The Court notes that a defendant should not be permitted to make an inaccurate assertion for the first time at trial and expect that the assertion must go unanswered. However, as discussed above, the State has offered extensive evidence regarding the Spiritual Warrior version of the Samurai Game. The State has presumably known since the start of the case that the Defendant and Spiritual Warrior attendees used the term "Samurai Game." If differences in the manner in which the game was conducted are significant, this evidence could have been developed and disclosed in the normal process of trial preparation and presentation. The Court concludes that the disclosure was not timely and is not relevant to a material issue; it is therefore precluded.

(b) Item 1 (Holotropic Breathwork).

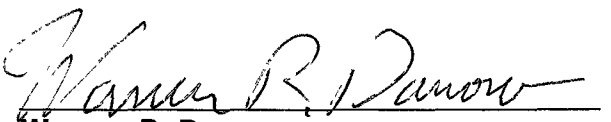
Item 1, the information pertaining to Holotropic Breathwork, raises many of the concerns relating to the Samurai Game. The letter itself is hearsay. The State obviously attached significance to the breathing exercise session long before trial, and it is not appropriate at this time to expand the trial to include evidence of the alleged "correct" way to facilitate a breathing exercise. It is not the time to litigate what may be complex questions involving intellectual property rights. The State has made no showing that improper and unlicensed facilitation of a breathing session would be evidence relevant to a material issue involving the conscious disregard of a risk of death in a sweat lodge. Again, propensity evidence – evidence suggesting that if the Defendant recklessly or negligently proceeded without proper training and licensing for a breathing exercise, he would recklessly subject sweat lodge participants to a risk of death – is inadmissible. The State has not argued that the defense opened the door to this evidence. The Court concludes that this evidence was not disclosed in a timely manner and is only marginally relevant such that its admission is barred by Rule 403; the proposed evidence relating to Holotropic Breathwork is therefore precluded.

(3) March 28 motion.

Throughout the trial the Defense has attempted to convey to the jury and to this Court its view of the importance of the legal distinction between Mr. Ray, personally, and the corporation, JRI. The defense cross-examined a witness, who had been employed by JRI at the time of the incident, extensively on the subject of the corporate structure and personnel of JRI. It was through cross-examination by the defense that evidence of the distinction has been presented in this trial. The defense has made no showing of prejudice or surprise resulting from the State's effort to admit additional evidence on the same subject. Although the State may have been able to anticipate that this issue would arise at trial, the Court concludes that the State has made timely disclosure under the circumstances.

The State clarified at oral argument that it seeks to admit evidence of the actual corporate hierarchy or personnel of JRI, and the Court concludes that evidence on this point would be relevant and admissible, assuming, as always, that appropriate foundation is provided. The State has not shown, however, possible relevance of all of the articles of incorporation, and, absent such a showing, this latter evidence would be precluded.

DATED this 20th day of April, 2011.



Warren R. Darrow
Superior Court Judge

cc: Victim Services Division